

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

BAY BANK, a division of COWLITZ  
BANCORP, a state chartered bank, successor  
to ASIA, EUROPE, AMERICAS BANK,

## Plaintiffs

V.

f/v ORDER OF MAGNITUDE, O. N.  
959446, its Engines, Machinery,  
appurtenances, etc., *IN REM*;

and

RAY G. WADSWORTH, and LYDIA J.  
WADSWORTH, et al.,

## Defendants and Third Party Plaintiffs

V<sub>2</sub>

## THE 13<sup>TH</sup> REGIONAL CORPORATION.

## Third Party Defendants.

This matter is before the Court on the Motion of Defendants and Third Party Plaintiffs Wadsworth, Redman, and Johnston (“Defendants / Third Party Plaintiffs”) to Compel arbitration of its third claims against The 13<sup>th</sup> Regional Corporation pursuant to the May 2004 Subscription Agreement.

1 between AlaskaCatch and The 13<sup>th</sup>. [Dkt. #62] The underlying litigation involves a claim by Bay Bank  
 2 against the Defendants / Third Party Plaintiffs (and a ship) seeking re-payment for a loan. The Defendants  
 3 / Third Party Plaintiffs are Managers of an entity known as AlaskaCatch LLC. AlaskaCatch entered into a  
 4 “Subscription Agreement” with The 13<sup>th</sup>, pursuant to which The 13<sup>th</sup> would purchase a majority interest in  
 5 AlaskaCatch, assume pre-existing loan obligations to Bay Bank, and, relevant here, to indemnify  
 6 AlaskaCatch’s Shareholders (Defendants / Third Party Plaintiffs here) with respect to that loan.

7 The Subscription Agreement was between AlaskaCatch and The 13<sup>th</sup>, and was signed by various  
 8 parties in their representative capacities on behalf of those respective entities. The 13<sup>th</sup> has argued that its  
 9 CEO, Ken Krajewski, did not have actual or apparent authority to enter into the Subscription Agreement,  
 10 despite the fact that it (like AlaskaCatch) performed under it for some time prior to the dispute leading to  
 11 this litigation. The Defendants / Third Party Plaintiffs bound AlaskaCatch, but also obtained in the  
 12 Agreement an indemnity provision benefitting themselves personally with respect to the Bay Bank loan.  
 13 They presumably did so because they were personally liable to the Bank on its loan to AlaskaCatch<sup>1</sup>.  
 14

15 When Bay Bank began its collection efforts against them, the Third Party Plaintiffs made an  
 16 arbitration demand upon The 13<sup>th</sup>. That effort was not successful as The 13<sup>th</sup> claimed that Krajewski was  
 17 not authorized to bind it to the Subscription Agreement generally and to its arbitration provision  
 18 specifically. When the Defendants / Third Party Plaintiffs were sued by Bay Bank in this case, they in turn  
 19 asserted a third party claim against The 13<sup>th</sup>, seeking to force arbitration of the Subscription Agreement’s  
 20 indemnity provision.  
 21

22 The 13<sup>th</sup> sought to dismiss that arbitration claim under Rule 12(b)(6), arguing that the Defendants /  
 23 Third Party Plaintiffs were not parties to the Subscription Agreement (and thus could not enforce its  
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25 <sup>1</sup>AlaskaCatch LLC is or was in a Chapter 11 bankruptcy. Because of this, when Bay Bank was not  
 26 repaid its loan, it sued, seeking payment from the guarantors of that loan, the Defendants /Third Party Plaintiffs  
 27 here.  
 28

1 arbitration provision). [See Dkt. # 32] Because the Subscription Agreement's indemnity provision made  
 2 the Defendants / Third Party Plaintiffs third party beneficiaries of the agreement, the court denied The  
 3 13th's Motion. [See Dkt. #47.]  
 4

5 Defendants / Third Party Plaintiffs now affirmatively seek to compel arbitration of their indemnity  
 6 claims against The 13<sup>th</sup> pursuant to the Subscription Agreement.  
 7

8 As it indicated it would in its initial Motion, The 13<sup>th</sup> raises additional defenses to the arbitrability of  
 9 the Defendants / Third Party Plaintiffs claims against it. It argues that Krajewski did not have apparent or  
 10 actual authority to bind The 13<sup>th</sup> to the "irregular," "one sided" and "unprecedented" sort of Agreement  
 11 that the Defendants / Third Party Plaintiffs now seek to enforce. It argues that "authority" issues are for  
 12 the court to determine in the first instance, and that the question of Krajewski's authority must be resolved  
 13 in court, not by the arbitrator. Indeed, it argues, this precise issue has already been ruled upon by Judge  
 14 Brian Gain of the King County Superior Court. In a 2004 state court action by The 13<sup>th</sup> against  
 15 AlaskaCatch, apparently still pending,<sup>2</sup> AlaskaCatch sought to compel arbitration pursuant to the  
 16 Subscription Agreement, and Judge Gain denied the Motion, ruling "The 13<sup>th</sup> is entitled to a jury trial on  
 17 the issue of whether Mr. Krajewski had authority to bind The 13<sup>th</sup> to the Subscription Agreement." [See  
 18 Dkt. 74-3; Declaration of James Fowler at Ex. 36]  
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20 It should also be noted that there are numerous other issues<sup>3</sup> and dynamics at play. Mr. Johnston,  
 21 who is both an attorney and a Defendant / Third Party Plaintiff as a Charter Member of AlaskaCatch,  
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23  
 24 <sup>2</sup>Absent from the voluminous filings in this case is an explanation of what exactly that state court case  
 25 involves, its interplay with the issues here, and its status. The Defendants / Third Party Plaintiffs do claim  
 26 they are seeking a reversal of Judge Gain's Order in state court.  
 27

<sup>3</sup>Also pending before the Court are the Plaintiff's Motion for Summary Judgment, The 13th's Motion  
 28 to Join AlaskaCatch LLC as a party, and the Vandeberg firm's Motion to Dismiss Johnston's claims against  
 it.  
 29

1 represents himself in this case. The 13<sup>th</sup> makes a number of claims that Johnston violated his ethical  
 2 obligations under the RPCs in his dealings with The 13<sup>th</sup>. For his part, Johnston has asserted an additional  
 3 Third Party Complaint against two of The 13th's members or shareholders, Liz Ross and Norman Ream,  
 4 and against its CEO, Ken Krajewski, personally, alleging breach of fiduciary duty, securities violations, and  
 5 the like. He has also sued The 13th's counsel herein, Vandeberg Johnson and Gandara, alleging that it  
 6 "aided and abetted" these violations and itself violated the RPCs in its conduct prior to this litigation.  
 7 There are numerous other counter and cross claims, and third party complaints by and among the various  
 8 parties.

10       Against this backdrop, the Defendants / Third Party Plaintiffs argue that their indemnity claims  
 11 against the 13<sup>th</sup> should be severed and referred to arbitration. They argue that Krajewski had authority to  
 12 enter into the Subscription Agreement as a matter of law, and that Judge Gain's ruling was made on an  
 13 incomplete record, is not binding, and was wrong.

14       It is beyond dispute that the Subscription Agreement contains an arbitration clause. It provides in  
 15 part that in the event of an unresolved dispute "either party may initiate binding arbitration by written  
 16 notice to the other naming a single arbitrator [from JAMS or WAMS]."

17       In the face of a genuine dispute, however, the issue of the Agreement's executor's authority to bind  
 18 The 13<sup>th</sup> is one for the court in the first instance, not an arbitrator. *See Three Valleys Mun. Water Dist.*,  
 19 925 F.2d 1136 (9<sup>th</sup> Cir. 1991); *see also Buckeye Check Cashing v. Cartenga*, 126 S. Ct. 1204 (2006).

20       As The 13<sup>th</sup> argues, the Defendants / Third Party Plaintiffs' Motion is akin to a Motion for  
 21 Summary Judgment on the authority of Krajewski to execute the Subscription Agreement. To compel  
 22 arbitration, the court must determine as a matter of law that there is no genuine issue of material fact as to  
 23 Krajewski's authority. There are numerous, documented "irregularities" in the Agreement's execution  
 24 and performance. Viewed in the light most favorable to it, The 13<sup>th</sup> has raised numerous genuine issues of  
 25 fact as to the circumstances surrounding the Agreement's execution generally, and specifically as to its  
 26  
 27  
 28

1 CEO's authority to bind it to an Agreement which brought it limited benefits, without the knowledge or  
2 consent of its Board. On this record, the Defendants / Third Party Plaintiffs are not entitled to summary  
3 judgment on the issue of Krajewski's authority.  
4

5 Additionally, compelling arbitration as the Defendants / Third Party Plaintiffs seek would be flatly  
6 inconsistent with Judge Gain's prior adjudication of this issue, if not an outright reversal of it. This the  
7 court will not do in any event. The arguments that that decision was wrong, inconsistent with later  
8 Supreme Court Authority (*Cartenga*), or based on an incomplete or inaccurate record are ones that should  
9 be made either in that court, or on a direct appeal of that ruling. It is not the place of this court to reverse  
10 or grant a reconsideration of the state court's ruling. This issue has already been decided against the  
11 Defendants / Third Party Plaintiffs.  
12

13 Finally, the complexity of the issues raised by all of the various claims, counterclaims, cross claims,  
14 and third claims now present in this case make the Defendants / Third Party Plaintiffs' claim of  
15 "severability" suspect, if not incorrect. Referring some of these claims to arbitration, where they are  
16 inextricably intertwined with the claims remaining here, only increases the complexity and cost of the case,  
17 and unnecessarily introduces the likelihood of inconsistent results.  
18

19 For these reasons, It is therefore ORDERED that  
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21 The Defendants' / Third Party Plaintiffs' Motion to Compel Arbitration [Dkt. #62] is DENIED.  
22

23 DATED this 1<sup>st</sup> day of December, 2006.  
24

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26

27 RONALD B. LEIGHTON  
28 UNITED STATES DISTRICT JUDGE